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90-957

Supreme Court, U.S.
FILED
DEC 10
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IN THE
Supreme Court of the United States
For The October 1990 Term

GARIE NEGRON,

Petitioner,

against

BANCO DE PONCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Did the bank make out of case for civil RICO violation, on a showing that it merely credited customers of its own VISA-MASTER CARD customer, causing an overdraft, without any showing that its own customer had committed any RICO racketeering acts to support Federal Jurisdiction?

2. May a Federal Court, consistent with due process of law, relieve counsel for a party in a civil case, without the consent of the party, and compel such party, to proceed to trial without counsel?

TABLE OF CONTENTS

Pages

Questions Presented for Review i

Unofficial Report of Opinion 1

Grounds for Jurisdiction.....1

Date of Judgment 1

Statutory Provision To Be Reviewed 2

Statement of the Case 2

The Trial 5

Plaintiff Bank's Case 6

The Decision.....10

The Court Committed Error In Relieving The Attorney For Garie Negron On His Claim Of A Fee Dispute And Irreconcilable Differences, Without Any Factual Showing To Support The Claim.....10

No Evidence Was Presented That The Proximate Cause Of The Banks Losses Was A Racketeering Enterprise And Racketeering Acts, Given That The Banks Losses Were Self Imposed.....11

Reasons Why Certiorari Should Be Granted 15

Appendix:

Order of the United States Court of Appeals for the Second Circuit.....1a

Decision 4a

STATUTE CITED

28 U.S.C. 1254.....1

IN THE
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GARIE NEGRON,

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BANCO DE PONCE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNOFFICIAL REPORT OF OPINION

On the 5th day of October, 1990, the United States Court of Appeals did enter an order affirming a judgment entered in the United States District Court for the Eastern Districe of New York (Nickerson, J.), awarding respondent treble damages plus attorneys' fees for civil violation of the RICO statute, a copy of which is included in the appendix. This opinion has not been officially reported.

GROUNDS FOR JURISDICTION

Jurisdiction is hereby invoked pursuant to 28 U.S.C. 1254.

DATE OF JUDGMENT

October 5th, 1990

STATUTORY PROVISION TO BE REVIEWED

18 U.S.C. 1964

STATEMENT OF THE CASE

This RICO action was commenced by an ex parte restraining order, staying NEGRON from transferring any property in her possession to the extent of $293,581. The affidavit of Robert Maisonet, a branch manager of the Banco de Ponce, recites that on the 21st day of January, 1987, Negron opened a checking account for Best Rate Travel Agency, at 100-05 Atlantic Avenue in Queens and solicited a Visa/Master charge-Merchants Agreement. The credit card account was opened after the bank inspected the travel agency.

During the second half of 1987, the bank noticed an unusual amount of chargebacks, which occurred by reason of customer requests. It was ascertained that the great majority of chargebacks were created by telephone orders by credit card, which Maisonet recites were not authorized. However, annexed to the affidavit was a copy of the Master Charge/Visa agreement authorizing a cardholder "to make a Card purchase without presenting his Card," which would seem to cover telephone purchases. Moreover, there was no prohibition of telephone sales in the "Member Agreement" and paragraph "5" of the Member Agreement specifically authorized telephone sales.

In July of 1987, Banco de Ponce ascertained that the travel agency was closed. On July 29, 1987, Negron was given notice that the Credit Card account was closed. From May 29, 1987 through July 31, 1987, there were depositis of $294,873. On the other hand, Banco de Ponce

could only recover chargebacks of $1,292. As of January 12, 1988, there was a debit balance of $43,505.50. Maisonet claimed a potential liability of $293,581, since there is no time limitation for returns "on fraudulent transactions", without any factual showing that any of the transactions were, in fact, fraudulent.

Maisonette recited that a technique called "telemarketing" was used. Maisonette then alleged, "Innocent customers were duped into giving their credit card number for nonexistent or misrepresented travel packages, which these customers thereafter rejected," without any identification of customers or the nature of the alleged misrepresentations.

Maisonet recited that Garie Negron owned property at 100-05 Atlantic Avenue, Richmond Hill and 95-27 76th Street, Ozone Park. It was also alleged that Negron transferred various sums from May of 1987 through August of 1987, concluding that they were fraudulent, without any recital of facts to support such accusation.

It was further alleged that Negron admitted that she engaged in a fraudulent marketing scheme and that she had been disposing of her assets, without details.

The jurisdictional basis alleged in the complaint is diversity of citizenship. The complaint alleged that the travel agency opened an account at the Banco branch located at 15 Graham Avenue in Brooklyn and entered into a Visa/Mastercard Member Agreement. It was alleged that the travel agency operated from January 21, 1987 to August 31, 1987.

The underlying complaint also names Irwin Sharpiro, Joseph Maiuro, Delco Tours, Inc. and "AAA" Holidays

International of South Florida, Inc., as codefendants. By the time the case reached trial, the codefendants entered into a settlement agreement with Banco de Ponce for the sum of thirty thousand dollars.

Count one charges Negron with common law fraud, by telemarketing trips to various points in the Caribbean and other places with air fair and hotel for $88.00, which vacations were not available and "through the use of sophisticated and subtle techniques" obtained credit card numbers from people. Then, it is alledge, the participants in the scheme would demand additional costs. The standing of the bank is based upon its voluntary act of allowing customers of the travel agency to charge back their credit card charges, with notice to the travel agency.

The second count of the complaint charges Negron with breach of the Member Agreement, by accepting credit card charges for telemarketing sales, without permission.

The third count charges Negron with RICO, alleging that the travel agency was the racketeering enterprise, which committed crimes of mail fraud and wire fraud.

The fourth count is for punitive damages.

Just prior to trial, defense counsel moved to be relieved on grounds that Garie Negron was without funds to continue to pay him, without disclosing how much had been paid to date. He alleged there were irreconciable differences between counsel and client, without particularizing what they might be. The Court relieved defense counsel and refused to appoint new counsel, requiring Garie Negron to proceed to trial without assistance.

THE TRIAL

The non-jury trial was commenced against GARIE NEGRON alone, the codefendants having settled with Banco de Ponce for the sum of thirty thousand dollars. As herein pointed out, the Court relieved defense counsel, leaving Garie Negron to fend for herself.

Counsel for the bank made the following opening statement:

> "We will prove that the defendant intentionally and without Banco de Ponce's authorization and knowledge engaged in a telemarketing scheme whereby it sold to persons receiving their unsolicited telephone calls, travel agents tour packages and other services based upon false and fraudulent promises. In carying out thi fraudulent scheme the defendant knew that the marjority, if not all of the persons called would thereafter reject the charges made against their Visas and Mastercharge cards causing chargebacks to the account of Best Rate at Banco de Ponce which is the plaintiff.
> We will show that defendant breached her contract with Banco de Ponce by failure to comply with the terms of the Mastercharge-Visa member agreement with Banco de Ponce and we will attempt to show that the defendant Garie Negron was engaged in a pattern of corrupt racketeering and we will attempt to ask for the cost of this suit including attorney fees."

PLAINTIFF BANK's CASE

Fred Dominguez testified that he is an Assistant Manager of the Banco de Ponce. Robert Maisonet, no longer with the bank, was branch manager of the Graham Avenue branch. He testified that he was unable to locate Mr. Maisonet. As a result, the Court granted the bank's motion to have the testimony of Mr. Maisonet given at the hearing, challenging the restraining order of Garie Negron's property, held on March 2nd, 1988.

Mr. Maisonet had testified previously, that Garie Negron came to the Graham Avenue branch, where she opened a Visa-Mastercard Charge Merchant account, for her travel agency located at 100-05 Atlantic Avenue.

He testified that for the month ending May 30th, 1987, there were $33,711 in credit card deposits, with a closing balance of $19,035.41. For the month ending June 30th, 1987, there were deposits of $149,454, with a closing balane of $48,994.72. For the month ending July 31st, 1987, there were deposits of $168,809.24, with a closing balance of $26,002.25. For the month ending August 31, 1987, there were no deposits, with a closing balance of $3,497.10. For the month ending September 30, 1987, there were no deposits, with a closing balance of $11,645.90. He testified that chargebacks were received from customers "for whatever reason," which caused the subsequent overdrafts. He was then asked that "as of right now", what was the overdraft for the travel agency. The answer was some $47,000.

Counsel for the bank summarized the deposition of Mr. Maisonet, representing, "she deposited charge slips in excess of $300,000 and gradually depleted the funds in the

account." However, since Garie Negron was not represented by counsel, no one was present to protect her interests and point out that a travel agent has the obligation to pay the provider for the trips she sells, which would account for withdrawals. Apparently, these payments to the travel providers were made by the codefendants in Florida, from funds sent by Garie Negron in New York. Mr. Valdez represented that there was an overdraft of approximately $47,000.

Mr. Valdez explained the mechanics of credit card shopping. He explained that the merchant is given credit for credit card sales slips and therefore, should be financially reliable. (A126-7) Mr. Valdez testified that Banco de Ponce did not want telemarketing business, where the customer does not sign the sales slip, but orders merchandise over the telephone, such as "Home Shopping." It appeared that one hundred percent of the business of Garie Negron's travel agency, Best Rate, was telemarketing.

Mr. Valdez defined a chargeback as "a situation that occurs when a person purchases anything, a service, merchandise with their credit card and subsequently feels that either the qualify of the merchandise or the service was not performed, or their card was used fraudulently and they refuse to pay and honor the charge, so they go their bank and send it back to the system. It's almost like a stop payment. Of course, there are chargebacks that occur through errors, the credit card numbers are wrong, they perhaps were forgotten and not processed. There are different types of chargebacks, some can be corrected others cannot."

The bank received about ont thousand chargebacks in this account, but could not produce any, since they are in the possession of the Queens County Districe Attorney

(that obviously never saw fit to bring any criminal proceedings.) Therefore, no evidence of a single chargeback was presented during the trial, nor the reason given by the customer for any specific chargeback.

Valdez and Maisonet went to the travel agency. When they found it was closed, they terminated the account. Garie Negron telephoned Valdez, who told her that the only way the account could remain open would be with collateral of approximately one hundred thousand dollars, against chargebacks. Garie Negron never settled the account.

Mr. Valdez represented to the court that the cocdefendants repaid thirty thousand dollars of the debit balance.

Garie Negron, called as a witness, testified her son-in-law was selling special rate tours, the low rates being available, because the trips were non-refundable. (A139) He prevailed upon her to obtain a Visa/Mastercard Member agreement with a bank and she did with Mr. Maisonet, whom, she claimed never visited her place of business. Her son-in-law told her that she could earn some money, by opening an account to clear credit card sales. The moneys she drew from her account, were wired to her Florida correspondent, the codefendants.

She also testified that according to the information, she received, crediting the thirty thousand dollars paid by the codefendants, there was a balance of nineteen thousand dollars.

She also testified that the money was sent to Florida not to defraud anyone, but to pay the travel supplier for the services provided. Thus, where a trave agent is paid

for airline accommodations, the agent must remit a large portion of the payment to the airline. In addition, some tours are sold at very low prices, with no right to cancel and therefore, the bank had no right to chargeback such type of accommodation. A discounted tour cannot be canceled. Sometimes, people would buy such tour, and be unable to take it. Under such circumstances, they would understandably seek a refund. The bank had no right to change the terms of the contract and give a refund, where the sale was marked final.

Garie Negron was given permission to return home to get her bank statements. SHe did and handed them up to the Court, which reflected that the debit balance was much lower than claimed by the bank.

The bank then recalled Fred Dominguez to change the false testimony he gave on direct examination.

According to Mr. Dominguez, the Best Rate debit balance as of February 27th, 1988 was $5,854.50. The statement reflected a credit for $7,947.44, which Mr. Dominguez explained, as follows: From the $30,000 settlement paid by the codefendants, the bank allocated $22,000 as legal fees, leaving a credit to the account of $7,947.44. When the account closed, the account had a debit balance of $41,606.06.

THE DECISION

The Court found Garie Negron guilty of violating the RICO statute, finding that she had engaged "in a fraudulent telemarketing scheme." The court found that "defendant wa in many instances selling phony or misrepresented travel packages by telephone. When the charges on the slips reached plaintiff and it credited the funds to the checking account, defendant withdrew funds from the account. After customers discovered the true terms of the misrepresented travel packages, they often cancelled their purchases, causing chargebacks, or debits, to the checking account."

However, in calculating damages, the Court credited the entire $30,000 payment by the codefendants to the $41,606.06, leaving a debit balance of $11,606.06, which the Court tripled to $34,818.18, adding $20,357.44 attorney's fees, for a total of $55,175.62.

THE COURT COMMITTED ERROR IN RELIEVING THE ATTORNEY FOR GARIE NEGRON ON HIS CLAIM OF A FEE DISPUTE AND IRRECONCILABLE DIFFERENCES, WITHOUT ANY FACTUAL SHOWING TO SUPPORT THE CLAIM.

Defense counsel entered into a binding contract with Garie Negron to represent her in this litigation. His contractual obligations was no different than that of any other party to a contract.

Prior to trial, defense counsel, as part of a motion for a jury trial and other relief, moved to be relieved, making the conclusory arguments that he was not being adequately paid and there were differences between counsel and

client. Without making inquiry as to what the differences were between counsel and client, both in respect to fee and in respect to strategy, the Court summarily relieved counsel, leaving Garrie Negron to fend for herself.

A contract retaining an attorney is no different than any other contract and an attorney, like any other litigant should not be relieved from his obligations. *Hashemi v. Schack*, 609 F. Supp. 391 (D.C. N.Y., 1984) The Court abused its discretion in relieving defense counsel, without inquiry. Indeed, the papers of defense counsel were conclusory. There was no allegation as to the financial terms of the retainer, and the amount allegedly owing. There was no specification as to the differences between attorney and client, to at least, afford the Court opportunity to try to resolve them.

The order of the Court merely authorized counsel to abandon his client, leaving Garie Negron virtually helpless on trial. Where this was done without inquiry as to the factual cause for disension, the judgment should be reversed and a new trial ordered.

NO EVIDENCE WAS PRESENTED THAT THE PROXIMATE CAUSE OF THE BANKS LOSSES WAS A RACKETEERING ENTERPRISE AND RACKETEERING ACTS, GIVEN THAT THE BANKS LOSSES WERE SELF IMPOSED

The only witnesses called were bank employees, who irresponsibly referred to the telemarketing of travel packages, as fraudulent. The record does not refer to a single customer of the travel agency, claiming to be defrauded. The record fails to describe the terms and conditions of any travel package. The record fails to indicate that appellant ever improperly obtained the credit card

numbers from customers. Indeed, it was brought out that Banco de Ponce referred this matter to the Queens County District Attorney. SInce no prosecution ever resulted from the referral, it is obvious that the District Attorney found no crimnality.

The theme advanced by the bank that it did not permit telemarketing is in conflict with paragraph 4 and 5 of the Member Agreement, which recites as follows:

> "4. If Member permits a Cardholder to make a purchase without presenting his Card, Member shall (1) print legibly on the sales slip the Cardholder's number. . . ."

Paragraph "4" of the Member Agreement would seem to contemplate telemarketing. Otherwise, there would not be an authorization to allow purchases by customers without presenting his credit card. However, any doubt concerning telemarketing is resolved in paragraph 5, which specifically provides for the latter type of distribution:

> "5. If, at Member's option, a Cardholder effects a purchase by telephone order ("TO") or mail order ("MO"), the procedures provided for in Paragraph 4 shall be followed except that on the sales slip Member shall sign his name. . . ."(A34)

The bank and its lawyers deliberately mislead the Court by claiming that telemarketing was prohibited. Paragraph "5" of the Member Agreement specifically provides that telemarketing is specifically authorized.

Introduced into evidence by the bank was the testimony given by Maisonet at the hearing in connection with the restraining order, who testified that the

chargebacks were "for whatever reason." Neither the decision of the Court below nor the testimony particularizes any alleged fraud perpetrated by GARIE NEGRON.

It is self evident that a bank does not have *carte blanche* to chargeback any and all credit slips on demand. This is especially so, in the travel business, where many packages are sold on a no refund policy. What apparently occurred in the case at bar was that any customer requesting of the bank cedit, got it on demand.

Indeed, paragraph "10" of the Member Agreement limits the warranty of the Member as follows:

> "Member warrants, represents and covenants with respect to each sales slip delivered to Bank as follows: that the slip arose from a bona fide and legal sale in the ordinary course of business in which Member gave value, that no defense, offset, counterclaim or dispute exists or shall arise to such transaction, that Member has not employed any scheme or device to evade the maximum applicable floor limit. . . ."

No showing was made that any sale was made, without full consideration to the customer. Indeed, although the third count charges defendants with mail and wire frauds to constitute essentials of a RICO complaint, there is no specifics concerning the identity of the customer or the content of the transaction or reprsentation that constituted fraud. Nor does the trial record descend to particulars. It cannot be that a Member violates the RICO statute, where a bank blindly elects to credit a customer, without inquiry into the customer complaint, merely to maintain its goodwill.

No showing was made that any racketeering act was the proximate cause of the losses suffered by the bank. *Burdick v. American Express Co.*, 677 F. Supp. 228 (S.D.N.Y., 1988), aff'd, 865 F.2d 527 (Snd Circ., 1989). The losses sustained by the bank, were not shown to be the proximate cause of any conduct by Garie Negron, but rather the election of the bank to crdit customers on demand, withut consultation with the member. Therefore, the vital ingredient of proximate cause from racketeering activity is missing from the bank's case. *Bastian v. Petren Resources Corp.*, 699 F. Supp. 161 (N.D.I11., 1988) Any loss by the bank was self-imposed.

Beyond that, it is essential for a racketeering complaint to stand, that a minimum of two racketeering acts be pleaded and proven. *United States v. Indelicato*, 865 F.2d 1370 (2nd Circ., 1989). These specific racketeering acts must be shown to constitute a pattern. *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985). Here, none were proven.

Moreover, the evidence at the trial reflected that the Travel Agency was out of business. The Supreme Court has held that a showing must be made "that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. . . .where the predicates can be attributed to a defendant operating as part of a long term association that exits for criminal purposes." *H.J. Inc. v. Northwestern Bell*, 109 S.Ct. 2893 (1989).

Any damages suffered by the bank were self-imposed. The bank elected to credit customers, without any consultation with its Member. No matter what warranties it is claimed that a Member makes to the bank, it cannot be that they encompass indemnification, where the bank elects to credit customers to maintain its goodwill, without

any investigation whether the customer complaint is meritorious. Thus, there was no basis for any recovery against Garie Negron. Surely, there was no basis for treble damages and an award of attorney's fees, given a total failure of proof of RICO.

REASONS WHY CERTIORARI SHOULD BE GRANTED

This Court should grant certiorari to prohibit the use of the RICO statute in purely civil matters, as in the case at bar, where the damages of the bank were self-created by crediting customers, solely for goodwill, and thereby causing an overdraft of a VISA-MASTERCARD customer, and not the proximate cause of any racketeering act. In addition, this Court should grant Certiorari to consider whether a Federal Court may relieve counsel for a party, without the party's consent.

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UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of October, one thousand nine hundred and ninety.

Present:

HONORABLE RICHARD J. CARDAMONE

HONORABLE ROGER J. MINER

Circuit Judges,

HONORABLE MILTON POLLACK

*District Judge**

BANCO DE PONCE,

Plaintiff-Appellee,

v.

GARIE NEGRON a/k/a GARIE CARDONA, IRWIN SHAPIRO a/k/a "CHUCK SHAPIRO, JOSEPH MAIURO, DELCO TOURS, INC., "AAA HOLIDAYS INTERNATIONAL OF SOUTH FLORIDA, INC., THE FIVE DEFENDANTS LAST NAMED DOING BUSINESS UNDER THE ASSUMED NAME OF S/E PLAYERS,

---

*Hon. Milton Pollack, Senior Judge, United States District Court for the Southern District of New York, sitting by designation.

Defendants,

GARIE NEGRON,

Defendant-Appellant.

Garie Negron, *pro se*, appeals from a judgment entered against her on January 2, 1990 for violations of the Racketeer Influenced and Corrupt Organizations Act, 18, U.S.C. §§1961 *et seq.* (1984) (RICO)

by the United States District Court for the Eastern District of New York (Nickerson, J.), which ordered Negron to pay Banco de Ponce (Banco) $34,818.18 for treble damages ($11,606.06 x 3), and $20,357.44 for attorney's fees, for a total of $55,176.12.

Subsequent to appellant's filing of a notice of appeal on January 11, 1990, Banco wrote a letter to Judge Nickerson requesting an amendment of the damages calculation, which resulted in an amended judgment dated July 16, 1990 that increased the liability on appellant Negron from $55,176.12 to $79,018.44. No appeal was taken from the amended judgment. But, because Banco's letter to Judge Nickerson was not a formal motion, and because Negron is a *pro se* litigant with no understanding of the effect of Fed. R. App. P. 4(a)(4), *see McCowan v. Sears, Roebuck and Co.*, Nos. 918, 1197, slip op. (2d Cir. May 25, 1990), we have decided to reach the merits of the original judgment, as amended on account of an arithmetical recalculation, dated July 16, 1990.

That judgment in the amount of $79,018.44 is affirmed for the reasons stated in Judge Nickerson' thorough opinion dated February 21, 1990.

s/ Richard J. Cardamone
Richard J. Cardamone, U.S.C.J.

s/ Roger J. Miner
Roger J. Miner, U.S.C.J.

s/ Milton Pollack
Milton Pollack, U.S.D.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

BANCO DE PONCE,

Plaintiff,

-against-

GARIE NEGRON, et al.,

Defendant.

----------X

LOPEZ & ROMERO, ESQS.
New York, New York
for plaintiff

GARIE NEGRON
Queens, New York
defendant *pro se*

NICKERSON, District Judge

Plaintiff brought this action under 18 U.S.C. §1961 *et seq.* (1982 & Supp. IV 1986), the Racketeer Influenced and Corrupt Organizations Act (RICO) and state law. Garie Negron is the only remaining defendant and is appearing *pro se.*

Plaintiff bank claims that defendant Negron engaged in a fraudulent telemarketing scheme. Plaintiff, which has settled with the other defendants, unwittingly advanced some $300,000 to finance the scheme and sustained damages. Defendant obtained from plaintiff a checking

account and a Visa/Mastercharge Merchant service account (the account), both for the use of the travel agency operated by defendant under the name A Best Rate Travel (Best Rate). Under the arrangement for a merchant service account, plaintiff allowed defendant to accept credit card slips as payment for goods and services. When defendant presented the slips to plaintiff it would credit the amount of the charges to defendant's Best Rate checking account.

In fact defendant was in many instances selling phony or misrepresented travel packages by telephone. When the charges on the slips reached plaintiff and it credited the funds to the checking account, defendant withdrew funds from the account. After customers discovered the true terms of the misrepresented travel packages, they often cancelled their purchases, causing chargebacks, or debits, to the checking account.

After noticing an inordinate number of chargebacks to the account and discovering that Best Rate was out of business, plaintiff closed the account. As of July 31, 1987, defendant had deposited a total of $294,873 in credit card slips in the checking account. During 1987 she withdrew about $157,000 from the account and transferred more than $87,000 to her co-defendants in Florida.

When plaintiff closed the checking account, it had a debit balance of $41,606.06. Plaintiff received $30,000 in settlement from the other defendants. However, plaintiff credited itself with $7,947.44 of that amount as attorneys fees and costs incurred in collecting from the other defendants, and now claims from defendant $19,553.250, to be trebled under 18 U.S.C. §1964(c), plus costs and atorneys fees.

The court finds no evidence in the record to justify plaintiff in applying to attorneys fees $7,947.44 of the $30,000 received in settlement from the other defendants. The court therefore finds that the damages for which plaintiff has not been reimbursed is $11,606.06.

Of course, defendant is responsible for this amount under New York State law. The question remains whether plaintiff has proven a RICO claim and is entitled to treble damages and attorneys fees. Ordinarily this court would not have supposed that plaintiff's acts were sufficiently analogous to those of an organized crime figure as to justify a finding that she has been guilty of a RICO violation. *See Bernstein* v. *Crazy Eddie, Inc.*, 702 F. Supp. 962 (E.D.N.Y. 1988) and cases cited.

However, the Second Circuit has given that statute such an expansive interpretation, *see* ***Beauford*** **v.** ***Helmsley***, 865 F.2d 1386 (2d Cir. 1989), ***vacated and remanded to Court of Appeals***, 109 S. Ct. 3236, ***reasoning aff'd and remanded***, slip op. 87-7216 (2d Cir. 9/15/89), that it appears this court is required to hold that defendant has violated 18 U.S.C. §1962.

Defendant, or she and her co-defendants, met the definition of an "enterprise." She engaged in activities which affected interstate commerce and participated in the conduct of the enterprise's affairs through a "patern of racketeering activity," as the Second Circuit has construed 18 U.S.C. §1961(5). By causing numerous mailings and telephone calls to be made in 1987, defendant violated the mail fraud statute 18 U.S.C. §1341, as well as the wire fraud statute, 18 U.S.C. §1343.

Perhaps Congress thought, as the Second Circuit said, "that in order to reach members of organized crime,

it was worth reaching others as well, "*Beauford, supra*, 865 F.2d at 1393, even an offender so insignificant as defendant. However, if this defendant is held to have committed a RICO violation then it is hard to conceive of many state business fraud cases that are not covered by RICO, and Congress has acted the part of a modern day Pygmalian creating not a beautiful Galatea, but an unexpected and imposing monster inflicting consequences wholly disproportionate to the offenses committed by persons such as defendant.

This court follows what it understands to be the Second Circuit's holding and concludes that plaintiff is liable for not only $11,606.06 but also for treble damages, attorneys fees and costs.

Plaintiff has submitted a statement of attorney's fees and costs in the amount of $47,160.21. After reviewing the complexity of the issues involved, the court determines the hours expended to be reasonable, but the fee to be slightly excessive. The court considers a fee of $140 per hour for Mr. Lopez and $100 for other counsel to be reasonable. In addition, recovery of fees against Negron for work done in preparing the action against the Florida defendants with which plaintiff settled is improper. Thus the court determines a quarter of the fees for the 11/30/87 and the 11/9/87 billing, a third of the 4/30/88 and 3/7/88 billing, and the total of the 10/31/89 and 9/6/89 billing should be attributed to defendant Negron. Total hours worked by Mr. Lopez and the other attorneys are thus 50.86 and 125.33 respectively. At the average rates listed above, $19,652.90 worth of fees are attributable to the case against defendant. In addition, using the same ratios discussed above, plaintiff expended $704.54. in costs. Thus costs and attorney's fees equal $20,357.44.

Thus defendant is liable for $34,818.18 for treble damages and $20,357.44 for attorney's fees for a total of $55,175.62.

So ordered.

s/ Eugene H. Nickerson
Eugene H. Nickerson, U.S.D.J.

Dated: Brooklyn, New
December 26, 1989

Supreme Court, U.S.
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(2)

No. 90-957

In The

Supreme Court of the United States

October Term, 1990

GARIE NEGRON,

Petitioner,

vs.

BANCO DE PONCE,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was sufficient evidence presented that the Petitioner Garie Negron committed fraud in her telemarketing activities and that the proximate cause of the bank's losses was the racketeering activity of a RICO enterprise?

2. Was the decision made by the United States District Court for the Eastern District of New York and affirmed by the United States Court of Appeals for the Second Circuit to relieve the attorney for Garie Negron from representing her correct?

TABLE OF CONTENTS

Page

Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Statutory Provisions to be Reviewed 1

Statement of the Case 1

Argument:

I. Sufficient evidence was presented that the petitioner committed fraud in her telemarketing activites and that the proximate cause of the Bank's losses was the racketeering activity of a RICO enterprise. 8

II. The decision made in the United States District Court for the Eastern District of New York and affirmed by the United States Court of Appeals for the Second Circuit to relieve the attorney for Garie Negron from representing her was correct. 17

Reasons Why Certiorari Should Not be Granted 20

Conclusion 23

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Beauford v. Hemsley, 865 F.2d 1386 (2d Cir. 1989), vacated and remanded to Court of Appeals, 109 S. Ct. 3236, reasoning aff'd and remanded, slip op. 87-7216 (2d Cir. Sept. 15, 1989) 10, 15

Beshear v. Weinzapfel, 474 F.2d 127, 134 (7th Cir. 1973) 22

H.J. Inc. v. Northwestern Bell Telephone Company, 109 S. Ct. 2893 (1989) 9, 14, 15, 20, 21

Jefferson v. United States, 277 F.2d 723, 725 (9th Cir. 1960) 22

Ma v. Community Bank, 494 F. Supp. 252, 260 (E.D. Wis. 1980) 22

Moore v. Sunbeam Corp., 459 F.2d 811, 829 (7th Cir. 1972) 22

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 105 S. Ct. 3275, 87 L.Ed. 2d 346 (1985) 10, 20, 21

Smith v. Widman Trucking & Excavating, 627 F.2d 792, 795-96 (7th Cir. 1980) 22

Statue of Liberty - Ellis Island Found. v. International United Indus., Inc., 110 F.R.D. 395, 397 (S.D.N.Y. 1986) .. 21

Contents

Page

United States v. Calandra, 414 U.S. 338, 353, 94 S. Ct. 613, 622, 38 L.Ed. 2d 561 (1974) 22

United States v. Indelicato, 865 F.2d 1370 (2d Cir. 1989) 10, 20

United States v. McQuade, 579 F.2d 1180, 1181 (9th Cir. 1978) 22

United States v. Turkette, 452 U.S. 576, 586-87, 101 S. Ct. 2524, 2530-31, 69 L.Ed. 2d 246 (1981) 20

Statutes Cited:

18 U.S.C. Section 1341 14

18 U.S.C. Section 1343 14

18 U.S.C. Section 1961 .....1, 10

18 U.S.C. Section 1961(4) 9

18 U.S.C. Section 1961(5) 15

18 U.S.C. Section 1962 1

18 U.S.C. Section 1962(c) 8

28 U.S.C. Section 1915 .....19, 22

Rules Cited:

F.R.E. Section 804(b)(1) 2

U.S. Sup. Ct. Rule 10, 28 U.S.C.A..... 20

No. 90-957

In The

Supreme Court of the United States

October Term, 1990

GARIE NEGRON,

Petitioner,

vs.

BANCO DE PONCE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

STATUTORY PROVISIONS TO BE REVIEWED

18 U.S.C. 1961, 18 U.S.C. 1962, 18 U.S.C. 1964

STATEMENT OF THE CASE

On March 2, 1988 a motion was heard before the United States District Court, Eastern District of New York (Nickerson, J.) for an order of attachment against the assets of GARIE NEGRON ("NEGRON") also known as GARIE CARDONA.

That motion was granted by the court.

On October 26, 1989 a trial was had before the same court. At the trial a motion pursuant to Section 804 (b)(1) of the Federal Rules of Evidence was made and granted whereby the entire transcript from the hearing of March 2, 1988 with supporting exhibits and other documentation presented at the hearing was admitted into evidence as Plaintiff's Exhibit 1 (A120-A122).

On January 2, 1990 a judgment was entered in the Eastern District of New York in favor of BANCO DE PONCE ("BANCO") against NEGRON in the sum of $34,818.18, treble damages, and $20,357.44 for attorneys fees, for a total of $55,176.12 (SA1).

On January 4, 1990, a letter was written to Judge Nickerson whereby a motion was made by the attorneys for BANCO asking that Judge Nickerson recalculate the amount of damages in the cause of action for fraud (SA2-SA4). Copy of said letter was served upon Petitioner (SA5-SA6). Judge Nickerson considered said motion and subsequently executed an amended memorandum and order increasing BANCO's treble damages to $58,660.50, thus increasing the total award to $79,018.44 (SA7-SA12). An amended judgment was entered pursuant to the amended memorandum and order on July 17, 1990 (SA13).

The appeal made by NEGRON to the United States Court of Appeals for the Second Circuit was taken from the original judgment entered on January 2, 1990 and not from the final amended judgment entered on July 17, 1990. Although both judgments resolve the factual issues of this case identically, only the one entered on July 17, 1990 should have been considered as the final judgment on this case and the judgment from which the appeal should have been taken, moreso where the latter judgment makes a final determination of damages. Under these

circumstances, the appeal should have been dismissed as premature and deemed a nullity.

Notwithstanding the foregoing, the United States Court of Appeals for the Second Circuit decided to reach the merits of the original District Court judgment, as amended on account of an arithmetical recalculation, dated July 17, 1990. That judgment in the amount of $79,018.44 was affirmed for the reasons stated in Judge Nickerson's thorough opinion dated December 26, 1989. An order was entered by the United States Court of Appeals for the Second Circuit on October 5, 1990.

Throughout this reply brief references are made to A and SA. A stands for the Appendix submitted by NEGRON to the United States Court of Appeals for the Second Circuit. SA stands for the Supplemental Appendix submitted by BANCO. It was necessary for BANCO to submit a Supplemental Appendix because NEGRON purposely omitted important documents, including trial exhibits, from her Appendix. In her petition for a writ of certiorari NEGRON has again misstated and omitted important facts in this case. The following are the true facts of this case.

In January 1987, the Petitioner NEGRON opened a checking account for her travel agency known as A BEST RATE TRAVEL ("BEST RATE") at BANCO's branch located at 15 Graham Avenue, Brooklyn, New York (A52-A53 and SA14). At the same time NEGRON and BANCO entered into an agreement, whereby BEST RATE would sell travel tickets, tours and other travel services through Master Charge or Visa credit cards (A34). The charge slips prepared for each sale made would then be deposited to the BEST RATE account at BANCO and be immediately credited as cash (A98-A99 and A124-A128).

For the first couple of months the BEST RATE account was inactive (SA14-SA19) but on June, 1987 BANCO began to notice

an unusual activity in the account. For the month ending May 30, 1987 there were deposits totalling $33,711 and an ending balance of $19,035.41. For the month ending June 30, 1987 there were deposits totalling $149,454.00 and an ending balance of $48,994.72. For the month ending July 31, 1987 there were deposits totalling $168,809.24 and an ending balance of $26,002.25. For the month ending August 31, 1987 there were zero deposits and an ending balance of $3,497.10. For the month ending September 30, 1987 there were zero deposits and an ending balance of *negative* $11,645.90 (A53-A55 and SA18-SA39). On July 29, 1987 NEGRON was notified by telephone that the BEST RATE merchant facility service had been closed (A6). Although the merchant service account was closed, the regular business checking account remained open until January 31, 1989 (A104, A152 and SA57).

The negative balance in the BEST RATE account was caused by an unusual number of chargebacks (charges to credit cards which were rejected by dissatisfied customers) that were being debited to the account (A55). Despite the substantial sales made by this organization there were insufficient funds to cover all of these charges. When the chargebacks began to appear in great numbers in June, 1987 there was enough money in the account to cover the debits that were being created (SA20-SA27). By the end of August though, all of the monies that had been deposited in the BEST RATE account from May through July had already been withdrawn or transferred out. Once there was no money left in the account, every chargeback received increased the negative balance (SA38-SA57).

The amount of chargebacks that were covered by monies which were in the account from May through early August approximated $22,300 (SA18-SA37). From the time that chargebacks could no longer be covered by monies in the account until the time the business checking account was closed on January

31, 1989 the bank incurred chargebacks in the sum of $49,553.50. This amount is evidenced by adding the closing balance on January 31, 1988 of *negative* $41,606.06 (SA57) to a credit that was made to the account in March, 1988 in the sum of $7,947.44 (SA47). When the $7,947.44 was credited to the account, the negative balance was reduced. That is why the credited amount was added back to the final negative balance of the account to come up with the total of chargebacks during the period when there was no money in the account to cover the debits created by said chargebacks (A151-A153 and SA2-SA4).

This cause of action was originally brought against NEGRON, an IRWIN SHAPIRO, a JOSEPH MAIURO, a company by the name of DELCO TOURS, INC., and another company known as AAA HOLIDAYS INTERNATIONAL OF SOUTH FLORIDA, INC., all these defendants known as doing business under the assumed name S/E PLAYERS (A16-A28). Since BANCO settled with the Florida defendants in this case for the amount of $30,000, the amount claimed as damages against NEGRON at trial was $19,553.50 (A151-A153 and SA2-SA4).

The withdrawal and destination of the monies in the BEST RATE account was clearly stated in ROBERT MAISONET's ("MAISONET") affidavit in support of the application for an order of attachment that was heard before Judge Nickerson on March 2, 1988 (A9-A11). MAISONET obtained this information from the debit slips and copies of cashed checks that were attached to BEST RATE account statements. These were admitted into evidence at the trial of October 26, 1989.

On May 27, 1987 a check for $14,573.10 was made by NEGRON to BANCO indicating a transfer. This check was apparently exchanged for cash since it carries the bank officer's initials thereon (SA18-SA19).

On June 2, 1987 a transfer of $16,854.39 was made to the credit of the S/E Players Account at the Family Bank of Hallandale, Florida (SA20-SA22).

On June 4, 1987 a transfer of $15,456.58 was made to the credit of the S/E Players Account at the Family Bank of Hallandale, Florida (SA20, SA21 and SA23).

On June 10, 1987 a transfer of $24,608.05 was made to the account of NEGRON at the Columbia Federal Savings Bank (SA20, SA21 and SA24).

On June 19, 1987 a transfer of $26,693.58 was made to the credit of the S/E Players Account at the Family Bank of Hallandale, Florida (SA20, SA21 and SA25).

On June 27, 1987, a transfer of $28,536.21 was made to the credit of the S/E Players Account at the Family Bank of Hallandale, Florida (SA20, SA21 and SA26).

On June 30, 1987 a check was made to NEGRON for $24,641.24, appearing to have either been cashed or deposited at Citibank, N.A., account No. 26105302 (SA27-SA29).

On July 13, 1987 a check was made to the order of NEGRON for $23,024.41 having the indorsement stamp of Columbia Federal Savings Bank on the back for deposit in NEGRON's account (SA28-SA30).

On July 15, 1987 a check was made to NEGRON for $8,361.28 appearing to have been deposited into her account at the Columbia Federal Savings Bank (SA28, SA29 and SA31).

On July 15, 1987, a check was made to the order of NEGRON for $7,000.00 which, by the indorsement stamp, appears to have

been deposited in NEGRON's account at Columbia Federal Savings Bank (SA28, SA29 and SA32).

On July 23, 1987 a check was made to NEGRON for $23,360.06 and was deposited at the Columbia Federal Savings Bank into NEGRON's account (SA28, SA29 and SA33).

On July 29, 1987 a check was made to the order of NEGRON for $41,469.00 and deposited into her personal account No.2215001213 (SA28, SA29 and SA34).

The last major withdrawal was made by a check dated August 4, 1987 made to cash for $13,518.00 which has a legend on the front in NEGRON's handwriting that the cash was being transferred to the Columbia Federal Savings Bank (SA35 and SA37).

The total withdrawals that NEGRON made from the BEST RATE account for her own benefit were $157,413.90. The total amount of the transfers made to the S/E Players account at the Family Bank of Hallandale, an account which was controlled by the Florida co-defendants, was $87,540.76.

Contact was made with NEGRON on several occasions and she admitted that she had been engaged in a telemarketing scheme, where customers were called and sold misrepresented travel services which caused the subsequent rejection of the credit card debits to the customers' accounts, thereby creating the chargebacks. On one occasion NEGRON indicated that BANCO could expect to receive back at least one third of all sales as chargebacks to the account (A55-A59, A63).

On all occasions in which NEGRON was contacted, she was requested to make some arrangements for repayment of the losses caused to BANCO. She indicated no desire to repay the losses

caused to BANCO, except that on September, 1987 she suggested to BANCO that it misrepresent to the other defendants that BANCO would again reopen the merchant facility service with BEST RATE. She assured BANCO representatives that if this falsity was stated by BANCO, she could obtain $100,000.00 from these defendants to be applied by BANCO to its losses (A60-A62).

At all times the defendant NEGRON denied that she had any assets or the ability to repay and denied that she owned any property on which security could be taken by BANCO to guarantee payment. She further withheld from BANCO information on two real estate properties in Queens under her other name of GARIE CARDONA (A59-A60).

ARGUMENT

I.

SUFFICIENT EVIDENCE WAS PRESENTED THAT THE PETITIONER COMMITTED FRAUD IN HER TELEMARKETING ACTIVITIES AND THAT THE PROXIMATE CAUSE OF THE BANK'S LOSSES WAS THE RACKETEERING ACTIVITY OF A RICO ENTERPRISE.

The Racketeer Influenced and Corrupt Organization Act ("RICO"), Section 1962(c) makes it unlawful for a person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprises' affairs through a pattern of racketeering activity, 18 U.S.C. Section 1962(c). Simply read, for a defendant to be found guilty of 18 U.S.C. Section 1962 (c), a plaintiff must prove existence of both an "enterprise" and a "pattern of racketeering activity". Both of these requirements were met by the Respondent at trial before Judge Nickerson of the United States District Court

for the Eastern District of New York. The United States Court of Appeals for the Second Circuit thereafter affirmed Judge Nickerson's decision.

Under 18 U.S.C Section 1961(4) an "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. In the present case the "enterprise" as defined by the statute was found to be the association of NEGRON, through her travel agency BEST RATE, with the Florida co-defendants.

The existence of the travel agency BEST RATE has never been disputed by Petitioner. This agency was visited by BANCO's officials and proved to be in operation (A52-A53). Mr. Maisonet stated in his testimony that BEST RATE had a group of individuals working for it and these individuals had lists of persons who had either Mastercharge or Visa cards. The card holders would be called and travel packages were then sold to them over the phone (A57-A58). In her affidavit in opposition to the motion for an order of attachment in March, 1988, NEGRON acknowledges her association with the Florida co-defendants and sheds some light as to the way the enterprise operated (SA71-SA79).

The enterprise in this case had all the appearance of a legitimate association and, in fact, some of the business it conducted seems to have been legal. What made this enterprise fall within the purview of the RICO statute, however, was that numerous fraudulent acts were committed by its members through such enterprise. *H.J. Inc. v. Northwestern Bell Telephone Company,* 109 S. Ct. 2893 (1989). These fraudulent acts constituted a pattern of racketeering activity.

During recent years a number of cases have construed the requirement of a "pattern of racketeering activity" as defined

by RICO. This Court in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L.Ed. 2d 346 (1985) held that, to constitute a pattern, while two acts of racketeering activity are necessary, they may not be sufficient. The requirement that a minimum of two racketeering acts is needed was also held in *United States v. Indelicato,* 865 F.2d 1370 (2nd. Cir. 1989).

Expanding the analysis of the statutory term "pattern of racketeering activity" and citing the legislative history of RICO, this Court also held in *Sedima, supra,* that it is the factor of continuity plus relationship which combine with the necessary acts to produce a pattern. The United States Court of Appeals for the Second Circuit in *Beauford v. Helmsley,* 865 F. 2d 1386 (2d Cir. 1989) *vacated and remanded to Court of Appeals,* 109 S. Ct. 3236 *reasoning aff'd and remanded,* slip op. 87-7216 (2d. Cir. 9/15/89) also held that the requirements of relatedness and continuity were essential to the pattern element.

This Court most recently in *H.J. Inc., supra,* addressed again the concept of a "pattern of racketeering activity". It held that the section of the statute headed definitions, 18 U.S.C. Section 1961, does not so much define a pattern of racketeering activity as state a minimum necessary condition for the existence of such a pattern, said minimum being at least two acts of racketeering activity, but that instead the term pattern itself requires the showing of a relationship between the acts and a threat of continued activity. This Court stressed that it is this factor of continuity plus relationship which combines to produce a pattern.

If we apply the requirements discussed above to the facts presented at trial it is clear that NEGRON has violated RICO. The Petitioner stated in her brief that:

> "The only witnesses called were bank employees, who irresponsibly referred to the telemarketing of

> travel packages as fraudulent. The record does not refer to a single customer of the travel agency, claiming to be defrauded. The record fails to describe the terms and conditions of any travel package. The record fails to indicate that appellant ever improperly obtained the credit card numbers from customers. Indeed, it was brought out that Banco de Ponce referred this matter to the Queens County District Attorney. Since no prosecution ever resulted from the referral, it is obvious that the District Attorney found no criminality."

The main witness called by BANCO at the hearing for an order of attachment and at trial was FRED DOMINGUEZ ("DOMINGUEZ"). This Court should take note that Petitioner incorrectly refers to DOMINGUEZ as VALDES all throughout her brief. Testimony showed that DOMINGUEZ was assigned as immediate supervisor and was responsible for the Merchant Service Department at BANCO since the latter part of 1987 (A98). His knowledge of the Merchant Facility Service was surpassed by no one at BANCO. Contrary to what the Petitioner states in her brief the record does show sufficient evidence that a racketeering enterprise and racketeering acts existed.

Plaintiff-Respondent's Exhibit 2 at the attachment hearing and Plaintiff-Respondent's Exhibit 4 at trial is a sample letter from a BEST RATE customer that was called on the telephone and offered a trip to the Bahamas that he had "supposedly" won. He was told over the phone that the trip would cost him $88 for two people, but when he received the brochure from BEST RATE it stated that his wife's trip would cost an additional $119.00. He was also told that this trip could be taken anytime through 1988, but the brochure received from BEST RATE stated that the offer was only good until January 1, 1988. The brochure also stated that he had to give BEST RATE three different dates when

he could take this trip. This detail apparently was not discussed in the telephone call either. Each and every statement made to the customer was a misrepresentation (SA80-SA81).

This sample letter received by the Mastercharge and Visa Association (the "Association") was the typical letter received from hundreds of dissatisfied customers. The customer's credit card account had been charged with the price of the travel package sold by BEST RATE. After discovering the serious misrepresentations made by BEST RATE, the particular customer demanded from the Association that a credit be made to his account. Meanwhile, at the time of the sale, BEST RATE had written a charge slip which it deposited in its account at BANCO creating a cash credit to that account. BANCO presented such charge slip to the Association and the Association was supposed to pay BANCO its value. What happened in the numerous cases in which BEST RATE sold fraudulent packages was that the Association did not honor the charge slips received through BANCO because the Association's customers had refused to pay for such fraudulent travel packages.

The charge slips rejected by the Association created the chargebacks that BANCO had to debit from the BEST RATE account. As pointed out in respondent's statement of the case, when the chargebacks originated, there were sufficient funds in the BEST RATE account to cover for them. NEGRON knew, however, that the chargebacks would continue at an alarming rate and she rushed to withdraw all monies from the account, transferring the funds either to another account of hers at a different bank or to the account of the co-defendants in Florida (A130-A132).

It is incorrect for the Petitioner to state in her brief that the record does not show evidence of any racketeering acts or any of the elements of fraud. Testimony at the attachment hearing

showed that five hundred of these letters referring to BEST RATE were written to the Association and in turn sent to BANCO (A100-A103). Testimony at the trial more than a year later showed that the amount of letters had increased to over one thousand (A130-A132). DOMINGUEZ, as the supervisor of the Merchant Facility Service, constantly reviewed the letters written and testified that these letters included grievances such as quality of merchandise, service not performed, and unauthorized use of card numbers as typical reasons customers had for requesting a credit to their account from the Association.

Petitioner also contends that since no prosecution ever resulted from the referral of this case to the Queens County District Attorney that the District Attorney found no criminality. This is a completely baseless conclusion and does not require a response.

Petitioner repeatedly states in her brief that all of the bank's losses were self imposed. The reason given was that BANCO blindly elected to credit a customer, without inquiry into the customer's complaint, merely to maintain its goodwill. The Petitioner states "that what apparently occurred in the case at bar was that any customer requesting from the bank a credit, got it on demand." The Petitioner would have this Court believe that she does not understand the creation of a chargeback. As stated above, the letters that were written by the defrauded customers of BEST RATE were not sent directly to BANCO. These letters were sent to the Association so that the customers' credit card accounts could be credited accordingly by the Association (A130-A132). NEGRON knows very well that BANCO would not be reimbursed by the Association and could do nothing about it other than seek from her reimbursement for the slips not honored by the Association (SA34, Merchant Agreement, Clause 10). Under the appearance of perfectly valid sales she had BANCO credit the BEST RATE account so that she could almost immediately thereafter take the money out for

her benefit and that of the Florida co-defendants.

The facts presented above clearly meet the requirements of continuity plus relationship in *H.J Inc., supra.* There can be no question that the hundreds of mail and wire frauds committed in violation of 18 U.S.C. Section 1341 and Section 1343, have the necessary interrelationship to be considered a pattern. All of the telephone calls and mailings were made to persons related by their potential interest in purchasing the travel packages offered. All of the frauds had the same goal of inflating the profits of BEST RATE through the sale of these travel packages.

The second requirement, the threat of continuity may be established by showing that the predicate acts or offenses are part of an ongoing entity's regular way of doing business. This requirement is satisfied where it is shown that the predicate acts are a regular way of conducting the defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO "enterprise". *H.J. Inc., supra.* This is the exact scenario in our case. The telephone calls and mailings made by BEST RATE were this entity's regular way of doing business. In fact it was the only way they conducted their business. Because of this fact, BEST RATE could have continued to conduct its business in this manner indefinitely. The only reason it did not, was because BANCO decided to close the Merchant Service Account when it noticed an unusual amount of chargebacks in the account. Appellant's view that a pattern of racketeering was not shown because the travel agency was out of business is absurd. The court in *H.J. Inc., supra,* did not intend to allow enterprises that were involved in a pattern of racketeering to escape RICO just because the enterprise closed down after the period of time during which it committed the racketeering activity. It is evident from the facts presented at trial that a pattern of racketeering existed. It was this same pattern of racketeering that was the

proximate cause of the losses suffered by the bank.

As Judge Nickerson states in his memorandum and order dated February 21, 1990: " . . . Defendant, or she and her co-defendants, met the definition of an 'enterprise'. She engaged in activities which affected interstate commerce and participated in the conduct of the enterprises' affairs through a 'pattern of racketeering activity' as the Second Circuit has construed 18 U.S.C., Section 1961(5) ." *See also H.J. Inc., supra,* and ***Beauford, supra.*** Judge Nickerson's decision further states that:. " . . . By causing hundreds of fraudulent mailings and telephone calls to be made in 1987, defendant violated the mail fraud statute 18 U.S.C. Section 1341, as well as the wire fraud statute, 18 U.S.C. Section 1343."

An additional issue which the Petitioner addresses in her brief is her assertion that "the bank and its lawyers deliberately misled the Court by claiming that telemarketing was prohibited." The Petitioner misinterprets the testimony of MAISONET and DOMINGUEZ. It is not telemarketing *per se* that is prohibited by the Agreement. It is telemarketing consisting of fraudulent solicitations which were prohibited. These actions directly violated paragraph 10 of the Member Agreement.

On January 1, 1987, NEGRON executed a Master Charge/Visa Member Agreement (the "Agreement") with BANCO (A34). From that date on NEGRON continuously breached said Agreement.

The terms at issue of the subject Agreement are as follows:

> "10. Member warrants, represents and covenants with respect to each sales slip delivered to Bank as follows: that the slip arose from a bona fide and legal sale in the ordinary course of business

> in which Member gave value; that no defense, offset, counterclaim or dispute exists or shall arise as to such transaction; . . . that Member shall indemnify and hold Bank harmless from any and all claims by a Cardholder arising from the sale imposed by way of defense, set-off or counterclaim; . . . If Bank determines that Member has breached any warranty or agreement hereunder, . . . Member shall repurchase upon Bank's demand such sales slip and Bank may thereupon charge Member's account for the amount credited to Member with respect to such sales slip (and in the event of any deficiency in Member's checking account, Member shall pay to Bank the amount thereof) . . . "

The testimony at trial showed that NEGRON created charge slips against the credit cards of persons called through the use of telephone solicitations. Contrary to the terms of the Agreement, the charge slips did not arise from a bona fide and legal sale in the ordinary course of business. As stated in the arguments above, these telephone sales were fraudulent for a variety of reasons. Misrepresentations were made as to the quality of the merchandise being sold and the services to be performed. In addition there was unauthorized use of card numbers (A100-A103 and A130-A132).

NEGRON further violated the Member Agreement by failing to repay BANCO for the chargebacks created because of the disputes as to the transactions with the cardholders. At no time has she ever repaid the losses caused to BANCO by these chargebacks (A60-A62, A134-A136).

II.

THE DECISION MADE BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK AND AFFIRMED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT TO RELIEVE THE ATTORNEY FOR GARIE NEGRON FROM REPRESENTING HER WAS CORRECT.

In August, 1988, GINO JOSH SINGER, ESQ., ("SINGER") as attorney for NEGRON, made a motion seeking to be relieved as counsel in the case and asking the United States District Court for the Eastern District of New York to appoint counsel for NEGRON from the Court's *pro-bono* panel. That part of the motion seeking relief as counsel was granted, but the appointment of counsel from the Court's *pro-bono* panel was denied by Judge Nickerson's memorandum and order dated December 6, 1988 (A40, A41; SA58-SA65). It is worth noting that Judge Nickerson's decision was not challenged until NEGRON'S appeal to the United States Court of Appeals for the Second Circuit more than a year and a half later.

Respondent has argued that petitioner's belated challenge of that decision was solely directed to divert the Court's attention from the real issue of the appeal, her racketeering conduct. Such characterization stems from the baseless nature of Petitioner's contentions and the fact that she hid from the Court essential information which clearly demonstrated the fallacy of her challenge. Petitioner still does not show this Court that the decision to relieve counsel was in error.

Petitioner attacks SINGER's affidavit terming the arguments set forth therein as conclusory. Petitioner knows they were not such, but that they fully depicted the reality not only that Petitioner was unable or unwilling to pay her attorney, but also that Petitioner disagreed with him as to the legal strategy to follow in defending her case. Petitioner herself alludes to both aspects

of her differences with counsel in a letter dated August 7, 1988, addressed to Magistrate Amon, which appellant conveniently left out of Appellant's Appendix (SA66-SA68) in her appeal to the United States Court of Appeals for the Second Circuit.

The letter above mentioned was specifically cited by Judge Nickerson in his memorandum of December 6, 1988. Contrary to what Petitioner would have this Court believe, Judge Nickerson did give careful consideration to SINGER's request and based his decision on the facts presented before him. Petitioner never controverted SINGER's allegations or, as Judge Nickerson said: " . . . made the Court aware of any reason why Mr. Singer's withdrawal impermissibly prejudiced her". In fact, on the date the motion to relieve counsel from representing NEGRON was called on the calendar, September 7, 1988, NEGRON failed to appear before the Court (SA; Docket Sheet, page C).

Judge Nickerson's decision was rendered on December 6, 1988 and the trial in this case was held on October 26, 1989. During the ten month period between the decision and the trial NEGRON had ample opportunity to hire another attorney, and she did so, although she chose not to disclose this fact to the United States Circuit Court. At a status conference held in June, 1989, NEGRON was notified that the trial was being scheduled for October 10, 1989. As the trial date was approaching, in the beginning of September, 1989, Respondent's attorneys were contacted by two different lawyers who said to represent NEGRON attempting to settle the case [see letters to Edward Grossman, Esq., and Jose Rey, Esq. (SA69-SA70)]. This information is not disclosed anywhere in Petitioner's papers. Apparently, NEGRON disagreed again with the advice of the two new attorneys, thought that the settlement terms were not favorable to her, and decided to take upon herself a *pro se* defense at trial.

NEGRON was not left helpless by Judge Nickerson to face

the trial. For whatever reason, she never asked to proceed as a poor person under 28 U.S.C. Section 1915, perhaps deciding against such option to avoid full disclosure of her assets or income. As far as Respondent knows, NEGRON is the owner of two real estate properties, which, though attached by the Court, could have served as collateral to any fee arrangement with an attorney to obtain legal representation. What happened here, however, was that NEGRON would not agree to any fee arrangement other than, perhaps, on a contingency basis. Given the facts of this case, it is understandable why such proposal would not be acceptable by most attorneys.

Respondent respectfully submits to this Court that NEGRON made a conscious and informed decision not to hire an attorney to represent her at trial. Although her motives are not at all clear and leave room for speculation, NEGRON's pattern of conduct in her dealings with counsel warrant the assumption that she thought herself more capable to defend her own interests than the attorneys that represented her and preferred to appear at trial *pro se.*

The case cited by Petitioner's brief concerning this issue is not on point. Respondent would not have even addressed the inclusion of such case, had this appeal been the work of a *pro se* litigant. It is too apparent, however, that the appeal was put together by an attorney, not by NEGRON herself. As she did in the trial and at the Circuit Court level, NEGRON is now before this Court playing again the part of a helpless innocent litigant to gain the sympathy of this Court. The facts of this case, however, speak for themselves, and show that this petition is totally baseless.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

Petitioner has not complied with the basic requirements of U.S. Sup. Ct. Rule 10, 28 U.S.C.A., in that Petitioner has failed to advance any special or important reason for the review sought. Petitioner has neither brought to the attention of this Court conflictive United States Court of Appeals decisions on the matter at hand, nor has she shown that the appellate decision being challenged, or the decision of the lower court, so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

The two reasons on which Petitioner bases her request are so unfounded that her petition should be rejected at once for lack of merit. As the first reason, Petitioner would have this Court grant the writ to prohibit the use of the RICO statute in purely civil matters. The applicability of the RICO statute to civil cases has been determined by this Court in *Sedima, supra,* and *H.J. Inc., supra.*

In *Sedima, supra,* this Court considered for the first time the civil action provisions of RICO reversing a decision of the United States Court of Appeals for the Second Circuit which held that a civil action could not be maintained unless the defendant had already been convicted of a predicate act or of a RICO violation. This Court stated that a prior conviction requirement is not supported by RICO's history, its language, or considerations of policy. It observed that RICO is to be read broadly taking into account not only Congress' self consciously expansive language and overall approach, *see United States v. Turkette,* 452 U.S. 576, 586-87, 101 S. Ct. 2524, 2530-31, 69 L Ed. 2d 246 (1981) but also Congress' express belief that RICO is to be liberally construed to effectuate its remedial purposes. *See also Indelicato* and *Beauford, supra.*

This Court in *Sedima, supra,* held that a civil RICO plaintiff must show the defendant's (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity, and that the statute requires no more than this. The Petitioner in her reasons in support of certiorari states that the damages of the bank were self created by crediting Visa-Mastercard customers, solely for goodwill, thereby causing an overdraft of Petitioner's account at BANCO, and not the proximate cause of any racketeering act. Respondent's arguments above set forth the true facts of this case and clearly demonstrate that all requirements of a civil RICO action have been met.

H.J. Inc., supra, is a very recent case decided by this Court which further indicates the Court's position as to the use of the RICO statute in civil matters. This Court stated that neither RICO's language nor its legislative history supports a rule that a defendant's racketeering activities form a pattern only if they are characteristics of organized crime. No such restriction appears in RICO's text. RICO clearly reaches civil as well as criminal defendants. It is unnecessary for this Court to review this issue.

The second reason advanced by Petitioner for a writ of certiorari is that this Court should consider whether a Federal Court may relieve counsel for a party, without the party's consent. This question has been addressed and decided by various United States District Courts and United States Court of Appeal cases. In his memorandum of December 6, 1988, Judge Nickerson cites as authority the case of *Statute of Liberty - Ellis Island Found. v. International United Indus., Inc.,* 110 F.R.D. 395, 397 (S.D.N.Y. 1986). In said case a law firm was allowed to be relieved as counsel based on allegations that his client had not cooperated with the firm and had not paid for services. The case was never appealed.

The grant or denial of any attorney's motion to withdraw

in a civil case is a matter addressed to the discretion of the trial court and will be reversed on appeal only when the trial court has abused its discretion. *Moore v. Sunbeam Corp.*, 459 F.2d 811, 829 (7th Cir. 1972). An abuse of discretion is established only where no reasonable man could agree with the district court; if reasonable men could differ as to the propriety of the court's action, no abuse of discretion is shown. *Smith v. Widman Trucking & Excavating,* 627 F.2d 792, 795-96 (7th Cir. 1980); *see also Beshear v. Weinzapfel,* 474 F.2d 127, 134 (7th Cir. 1973).

In the case at hand, Judge Nickerson did not abuse his discretion in relieving SINGER as counsel for NEGRON. As stated above in Respondent's argument, Judge Nickerson gave very careful consideration to SINGER'S request and based his decision on the facts presented before him. (See Argument II herein). In reference to Petitioner's lack of opposition to SINGER's motion to be relieved as counsel, *see Ma v. Community Bank,* 494 F. Supp. 252, 260 (E.D. Wis. 1980).

The case law on whether a Federal Court may compel a party, such as Petitioner, to proceed to trial without counsel is well settled. Motions for appointment of counsel in civil cases are addressed to the sound discretion of the trial court and are granted only in exceptional circumstances. When a claim of poverty is made, it is proper and indeed essential for supporting affidavits to state facts as to affiant's poverty with some particularity, definiteness and certainty. *United States v. McQuade,* 579 F.2d 1180, 1181 (9th Cir. 1978) and *Jefferson v. United States,* 277 F.2d 723, 725 (9th Cir. 1960). In this case NEGRON never asked to proceed as a poor person under 28 U.S.C. Section 1915, perhaps deciding against such option to avoid full disclosure of her assets and income. This Court has previously decided that a person who can afford to retain counsel has no constitutional right to have counsel appointed. *United States v. Calandra,* 414 U.S. 338, 353, 94 S. Ct. 613, 622, 38 L. Ed 2d 561 (1974).

CONCLUSION

Petitioner has failed to advance any reason why this Court should grant certiorari. Her petition should be denied. If said petition is granted then we ask this Court to affirm the decision of the United States District Court for the Eastern District of New York, which was thereafter affirmed by the United States Court of Appeals for the Second Circuit. The decision to relieve the attorney for Petitioner NEGRON was correct and sufficient evidence was presented that Petitioner NEGRON committed fraud in her telemarketing activities through a RICO enterprise, which activities were the proximate cause of the bank's losses.

Dated: New York, New York
January 10, 1991

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